

**FINAL REPORT
OF THE
INTERIM STUDY COMMITTEE ON
STATE GOVERNMENT ISSUES**



**Indiana Legislative Services Agency
200 W. Washington Street, Suite 301
Indianapolis, Indiana 46204**

November, 1998

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1998

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Anne Haley
Attorney for the Committee

Susan Preble
Fiscal Analyst for the Committee

FINAL REPORT¹

I. LEGISLATIVE COUNCIL DIRECTIVE

The Legislative Council directed the Committee to do the following:

- (1) Study access to public records, including fee structures for copies of public records.
- (2) Study the issue concerning the appropriate percentage of signatures that should be required on a petition to change a town to a city.
- (3) Study issues related to the creation of a Department of Indiana Heritage.²

II. INTRODUCTION AND REASONS FOR STUDY

- (1) The basis of the Committee charge concerning access to public records is House Concurrent Resolution 15, authored by Representative Kruzan and Representative Munson and Senate Concurrent Resolution 43, authored by Senator Johnson.
- (2) The Committee charge concerning the appropriate percentage of signatures required on a petition to change a town to a city was assigned to the Committee by the Legislative Council.
- (3) The basis of the Committee charge concerning creating a Department of Indiana Heritage is Senate Concurrent Resolution 25 and Senate Bill 23, authored by Senator Merritt.

III. SUMMARY OF WORK PROGRAM

The Committee met six times during the interim:

- (1) The first meeting of the Committee was held on June 23, 1998 and was devoted to organizational matters and receiving testimony on the issue of access to public records and public meetings.
- (2) The second meeting of the Committee was held on July 28, 1998. The Committee received testimony on all the Committee charges.
- (3) The third meeting of the Committee was held on August 25, 1998. The Committee received testimony on the public access charge that addressed the Access Indiana Information Network and copying fees.
- (4) The fourth meeting of the Committee was on September 22, 1998. The Committee received

¹ The final report was adopted by a unanimous vote of the Committee members present.

² See Legislative Council Resolution 2-1998.

additional testimony on public access charge that addressed the issue of compliance with the public access laws and the problems with the mechanics of the public access statutes.

(5) The fifth meeting of the Committee was on October 6, 1998. The Committee received testimony concerning compliance with the public access laws. The Committee discussed and received testimony on preliminary drafts of legislation.

(6) The sixth meeting of the Committee was on October 20, 1998. The meeting was devoted to Committee discussion and vote on preliminary drafts of legislation. The Committee voted on other findings and recommendations and the adoption of a final report.

IV. SUMMARY OF TESTIMONY

The Committee heard testimony from 68 witnesses. The Committee received written comments and testimony from 34 people. This final report is a general summary of the testimony and comments received by the Committee. The Committee meeting minutes are located on the Internet at www.state.in.us/legislative/committees/icsg.html.

A. Access to Public Meetings and Records

1. Current measures by state and local governments to provide access

Representatives of state government detailed efforts at the state level to resolve problems with public access. The Indiana Attorney General described his office's efforts to educate the public about the public access laws. A representative of the Office of the Governor announced the appointment by the Governor of a Public Access Counselor to answer questions about the public access laws and issue advisory opinions. In addition, the Governor's Public Access Task Force was created to hear citizen complaints and make recommendations for improving public access. The Indiana Secretary of State discussed "creating an open model of government for the 21st century" which she stated requires government officials at all levels to harness technology to permit and encourage meaningful interaction between the government and the people it serves. The Secretary of State indicated that her office is making a wide range of services and information available to the public by computer, including campaign finance information and corporate filings. Representatives of the Intelenet Commission, the Access Indiana Information Network, and Vanderburgh County government also testified on the services and information that governmental agencies have made accessible to the public by computer.

2. Denial of access to public records and public meetings

Citizens, representatives of the media, representatives of corporations, and representatives of citizen organizations recounted many instances in which they encountered problems in trying to obtain access to public records from a wide variety of public offices. Witnesses gave a number of reasons for their difficulty in accessing public records, including inconsistency in the record systems of local units, intentional unlawful denial of access to records, lack of education of public employees on the public access laws, and the failure of agencies to use current technology. Representatives of the news media discussed an investigation conducted by several newspapers across the state that revealed how many government agencies do not comply with requests for public records. The comment was made that the public access laws need to be drafted in simpler language. County sheriffs representatives testified that when

requestors of public records are rude in dealing with government personnel, they foster resistance instead of cooperation.

On the issue of access to public meetings, a representative of a citizen's organization indicated that the General Assembly should record or keep minutes of its standing committee meetings.

3. Copying fees

In General: Copying fees

Under IC 5-14-3-8 of the public records law, the copying fees of state agencies are set by the Department of Administration. This fee is currently fifteen cents per page. Public agencies that are not state agencies (this includes local units of government) are allowed to set their own copying fees not to exceed the actual cost. Actual cost is not defined by the statute. A state or local agency may not charge a fee for inspecting or searching for a public record. Some local and state agencies have copying fees set by statute, which supersede the fee provisions under the open records law. Local and state agencies may charge a "reasonable fee" for inspection of public records by electronic device or enhanced access. In addition, local and state agencies may charge a fee for copying a computer tape, computer disc, or microfilm that does not exceed the amount determined under the statute.

Testimony

Citizens and witnesses representing title companies, citizen's organizations and a news media organization testified that copying fees should represent the actual cost of making copies, since labor costs and overhead costs have already been paid by taxpayers. Some witnesses supported the position that copies should be free. The testimony indicated that agencies are making a profit from copying fees, and in some cases, fund agency operations from fees. The recommendation was made by some witnesses that a uniform statewide copying fee should be established, removing the discretion from local units to establish fee schedules and eliminating the inconsistency between fees charged by local agencies. The comment was made that the difference in fee schedules for paper documents and electronic access and retrieval of documents should be eliminated. Witnesses testified that the public should be allowed to use their own equipment to copy records at no cost. On the cost of duplicating computer tapes, discs and microfilms as set forth in IC 5-14-3-8(g), a representative of a news media organization testified that labor costs should not be included in direct cost; the publication cost component under IC 5-14-3-8(g)(2) should also be eliminated.

Representatives of title companies also testified that public records should be available in bulk form at a reasonable cost. The representatives indicated that the public is sometimes denied access to public records that are copyrighted.

A witness representing an organization of county governments, testified that a majority of county recorder's offices are totally supported by service fees for document filings and copy charges. If these fees were reduced or eliminated, property taxes would be needed to fund services. Since costs vary from county to county, copy fees should be determined locally. Copying fees should consider: (1) the time spent by personnel making copies; (2) correlating that time with the salaries and benefits of the employees performing the services; and (3) direct copier cost specific to making copies for the public. Commercial users should be subject to the same copying fees as the general public. The witness testified that giving the public blanket authority to use their own copying equipment could put public records at risk and be unmanageable due to the large number of title companies in some counties.

A municipal attorney testified that the failure to include retrieval and search costs in copying fees is equivalent to an unfunded mandate on local governments. A fee exemption should be created for copy fees that one local unit must pay to another local unit or the state in order to obtain a document. The witness indicated that small local units do not have the means to duplicate audio and video tapes, or to record minutes. The witness urged the Committee to consider allowing interested parties other than media representatives to get notice of public meetings by making an annual request, but also consider the potential cost to local units.

The Indiana Attorney General testified that copying fees should be set at the lowest level possible that would still allow agencies to recover costs.

4. Ensuring Compliance with the Open Door law and the Public Records Act

In General: Open Door Law and Open Records Law: Attorney's Fees: Absence of Penalties

The open door law does not impose any civil or criminal penalties against a public official or public agency that conducts a meeting in violation of the law. A person may, however, seek to have a policy, decision, or final action declared void by a court. A person may also request a court to enjoin the public agency from conducting the meeting. Under IC 5-14-1.5-7, a court has discretion to award attorney's fees to a prevailing plaintiff if the court finds the public agency's violation is "knowing and intentional" or to a prevailing defendant if the court finds the action was "frivolous and vexatious".

The open records law does not impose any civil or criminal penalties against a public official or public agency that denies a person the right to inspect and copy a record in violation of the law. A person may compel disclosure of the records by filing an action in court. Under IC 5-14-3-9, a court has the discretion to award attorney's fees to a plaintiff who "substantially prevails" if the court finds the public agency's violation is "knowing and intentional" or to a prevailing defendant if the court finds the action was "frivolous and vexatious". It is a Class A misdemeanor for a public employee, public official, or an employee or officer of a contractor of a public agency to "knowingly or intentionally" disclose confidential information.

Testimony

The Indiana Attorney General recommended two options to the Committee improve compliance with the public access laws: (1) give ombudsmen the authority to receive complaints; or (2) create an administrative board for ombudsmen to present complaints to on an as-needed basis. A representative of the Governor's Office recommended that the position of Public Access Counselor, which was created by the Governor, be made a statutory office.

A representative of the Connecticut Freedom of Information Commission described how the Commission adjudicates public access disputes, creating a body of case law that can be relied upon in making public access decisions. The witness recommended that the public access law be kept simple, because it is primarily citizens that use it.

Citizens, representatives of citizen's organizations, and a representative of a news media organization testified that the position of Public Access Counselor should be made statutory. In addition, some witnesses testified that a commission should be established, either at the state or local level, to resolve public access disputes. The suggestion was made that the Indiana Public Records Commission could fulfill this function at the state level. Some witnesses testified that a public access commission, the public access counselor, or the courts, should have the power to

levy penalties or fines. On the issue of penalties, witnesses testified that as in other states, criminal or civil penalties, including monetary fines, mandatory training, community service, or impeachment, need to be assessed against public officials that violate the open door law and open records law. Some witnesses recommended that an official or employee incur personal liability for a monetary civil penalty and that the state should be prohibited from defending the violators. An additional suggestion was that plaintiffs should be able to recover money damages for time spent in obtaining disclosure. Witnesses testified that successful plaintiffs should be able to recoup attorney's fees and costs. In addition, public access cases should be expedited by the courts. Public officials and employees must be educated on public access laws. Witnesses testified that public agencies should maintain a readily available list of documents that may be disclosed.

Witnesses representing county units indicated support for more education of public officials and employees and indicated that education and advice is currently provided to employees and officials on the public access laws.

Representatives of school boards and school board superintendents testified that school officials receive education on access to public records statutes and strive to comply with the statute. Consequently, school boards should not be subject to any restrictive compliance remedy. These representatives indicated that they oppose the establishment of a Commission to handle public access issues as an unnecessary expansion of bureaucracy. The point was made that school employees and superintendents are not elected officials and are constrained by school board policies and guidelines, and the budget, equipment and staffing limitations of the school district. The representatives expressed concern for whether a public access commission directive would conflict with a board guideline or policy or require additional staff or equipment not possible under the school budget.

5. Mechanics Issues

Open records law

Currently, the public records statute is silent as to when information must be released after a request for records has been approved. A representative of a news media organization, citizens, and representatives of citizen organizations testified that the public records statute needs to be amended to provide that records will be provided "in a reasonable time" after a request has been approved, "without delay" or "in an expeditious manner". Witnesses also asked for clarification of the disclosure exemptions for "interagency or intragency deliberative" material and attorney work product. These other suggestions were made:

- (1) The following should be disclosable:
 - (A) Information concerning arrests and convictions that is part of a public employee's personnel file or a public employee's application for employment.
 - (B) Library or archival records that refer to the requestor of the records.
 - (C) Information indicating or suggesting the authenticity of disclosable records such as oaths of veracity, signatures, and names of authors of disclosable records.
- (2) The open records laws should apply to child support actions.
- (3) A requestor should not be required to provide the name of an individual about whom the requestor is seeking information on. A reasonable physical description of the individual should suffice.
- (4) At the public's request, the public agency should be required to disclose records by mail.

- (5) The procedure for litigating a public records issue should be administrative and not require a knowledge of, or an adherence to, the Indiana Forms of Pleading and Practice.
- (6) There should be a legal sanction, including a possible criminal sanction, against a respondent to a records request who does any of the following:
 - (A) knowingly creates a copy of a disclosable public records that is illegible.
 - (B) creates a public record with the disclosable information to respond to a request rather than provide the requested record itself.
 - (C) knowingly denies the existence of a public agency record whether or not the record is disclosable in whole or in part.
 - (D) frivolously refuses to acknowledge or accept a reasonable and lawful oral or written request for public records.
- (7) It should be clarified that working drafts are accessible.

A representative of a news media organization testified to the following:

- (1) Public records kept by a private entity that contracts with a public agency need to be made accessible to the public.
- (2) Information from a law enforcement agency concerning suspected crimes, accidents and complaints should be released within 24 hours even if a daily log has not been prepared.
- (3) Information concerning ambulance runs needs to be disclosable.
- (4) Information concerning a death should be released by the office of the coroner although a document has not yet been created containing the information.
- (5) The commercial use prohibition for records obtained on computer disk or tape should be eliminated.
- (6) The state department of health should be required to release certain inspection reports and records.

Representatives of school boards and school superintendents agreed that the public records statute should be amended to provide that records will be provided "in a reasonable time" after a request has been approved, rather than require the agency to release the record within a specified period of time. These representatives oppose including private entities in the coverage of the public records law until the issue is clarified and oppose tightening the definition of "deliberative material" as an unnecessary measure.

Open Door Law

On the issue of the open door law, a representative of a news media organization testified that meetings of private entities that contract with a public agency should be accessible to the public. In addition, a series of gatherings of less than a quorum of members of the governing body should also be included. The witness recommended adding a provision to allow a member of a governing body to participate in a meeting by teleconferencing. On the issue of notices, it was recommended that public agencies send meeting notices to news media by facsimile machine. It was also suggested that the meeting notice exceptions be eliminated for continuous session and administrative functions.

Representatives of school boards and school superintendents indicated that they oppose any measure to make committee appointments subject to the open door law. The representatives also object to superintendent's committees being made subject to the open door law and making deliberations regarding personnel or student conduct public.

B. Petition Procedure for Changing a Town to a City

In General: The Petition Procedure

Under IC 36-4-1-4, if a specified number of town voters petition the town legislative body for a referendum on the issue of whether the town should change to a city, the legislative body must adopt a resolution for a referendum on the issue. The number of signatures required on a petition to the legislative body is the number of town voters equal to two percent of the total vote cast at the last election for the Office of Secretary of State.

Testimony

The attorney for the Town of Edinburgh, Indiana testified that the number of signatures required on a petition submitted to the town legislative body is too low. In the case of Edinburgh, only 23 signatures were required. The witness recommended that the signature requirement be increased to 20% of registered voters or 10% of the town's population. In addition, because voter interest can be low for primary elections, the local public question should be placed only on the general election ballot.

A representative of the Indiana Election Commission Division testified that an amendment to the petition law would not violate the National Voter Registration Act.

A witness representing municipalities testified to the costs involved in changing to a city government, including contributing to police and fire pension funds. The witness recommended eliminating the petition procedure and giving the town legislative body the discretion to determine whether to change from a town to a city.

C. Creation of a Department of Indiana Heritage

The author of a white paper on the creation of a Department of Indiana Heritage explained how the Department would bring together as divisions within one department the existing heritage divisions and agencies: The Indiana State Library, Indiana War Memorials Commission, Division of Historic Preservation and Archeology, Division of State Museum and Historic Sites, Indiana Main Street/Heritage Tourism Program, Indiana Historical Bureau, and Indiana State Archives. The witness described the perceived benefits to a unified historical agency in other states.

Citizens, historians, and consumers of historical and cultural services testified that joining the agencies under one department would make it easier for the public to locate services that are currently fragmented and sometimes duplicated by the agencies. It was pointed out, however, by one witness, that unless the agencies are physically united, the public will still have to visit several locations to obtain services. Witnesses testified that joining the agencies would also foster coordination among the agencies in working for a common goal and allow the agencies to share resources. Additional benefits in creating a department include fostering an awareness of Indiana heritage, making the agencies more visible in government, and promoting heritage tourism. A witness testified that if separate agencies are eliminated, public debate will also be eliminated as funding disputes become intragency debates.

A former Governor expressed concern whether the various state officials and agency and department heads that would be affected by the creation of a Department of Indiana Heritage have been involved in the proposal and agree to it. A witness representing the executive branch of government testified that the Governor and Lieutenant Governor support the idea, but that additional information is needed regarding the duties of the agency, the rosters of people in the

agencies and its budgetary needs.

V. COMMITTEE FINDINGS AND RECOMMENDATIONS

A. Access to Public Records and Public Meetings

1. Copy fees

The Committee adopted the following proposal, as amended, by nine affirmative votes:

Preliminary Draft 3397: Definition of actual cost for public records copying fees.

2. Compliance Issues

The Committee members present voted unanimously to adopt the following proposal:

Preliminary Draft 3481: Public records and open door compliance.

3. Internet notice

The Committee members present voted unanimously to adopt the following proposal:

Preliminary Draft 3534: Internet notice of state meetings and bid lists

4. Mechanics issues

The Committee members present voted unanimously to adopt the concept but not the language of Preliminary Draft 3532 as amended.

B. Petition Procedure for Changing a Town to a City

The Committee members present voted unanimously to adopt the following proposal:

Preliminary Draft 3270: Changing a town to a city; utility service boards.

C. Creation of a Department of Indiana Heritage

The Committee members present voted unanimously to adopt the concept of creating a Department of Indiana Heritage.

A copy of this report is available on the Internet. Reports, minutes and notices are organized by committee. This report and other documents for this committee can be accessed from the General Assembly Homepage at <http://www.state.in.us/legislative/>

WITNESS LIST

Meeting testimony

Ms. Colleen Aguirre, Citizens in Action
Mr. John Altholt, Evansville Police Department
Ms. Eleanor Arnold, consumer of historical and cultural services
Ms. Kathryn Azhar, Fishers, Indiana
Ms. Debra Barrett
Mr. Robert Barrows, consumer of historic services
Mr. John Berntson
Mr. Fred Biesecker, General Counsel to the Office of the Governor
Ms. Helen Boothe
Mr. William "Brad" Bradley, Network General Manager, Access Indiana Information Network
Ms. Wendy Brant, Zionsville, Indiana
Ms. Charlene Bredemeier, Carmel, Indiana
Ms. Kathleen Chester
Mr. David Scott Coker
Mr. Anthony Copeland, Citizens in Action
Mr. David H. Cox, Editor, Terre Haute Tribune Star
Mr. Ken Cress
Mr. William Doherty, Friends of the Indiana State Archives
Mr. E.W. "Pete" Drum, Friends of the White River
Sheriff Doug Dukes, Noble County, Indiana
Mr. Mike Eslinger, Indiana Sheriff's Association
Mr. Larry Fox, Carmel, Indiana
Ms. Tonya Galbraith, Indiana Association of Cities and Towns
Ms. Sue Anne Gilroy, Indiana Secretary of State
Professor James Glass
Mr. Michael Lee Gradison
Ms. Glory-June Greiff, consulting historian
Mr. Dan M. Griffith, Covington, Kentucky
Mr. Jeffery Gunning, Town Attorney for the towns of Beverly Shores and Ogden Dunes
Ms. Charlotte Hammond, Akron, Indiana
Mr. Charlie Hiltunen, Indiana Land Title Association
Mr. Wendell Hudson
Mr. Fred Jones, Old Republic Title Company
Mr. Stan Jones, Commissioner of the Commission for Higher Education and Chairman of the Intelenet Commission
Mr. Clarke Kahlo, Protect Our Rivers Now!
Ms. Yvonne Kersey
Mr. Stephen Key, Counsel for Governmental Affairs, Hoosier State Press Association
Mr. Brad King, Indiana Election Commission Division
Mr. George Kirkby, Hobart, Indiana
Ms. Vickie Kivett, Morgan County Recorder
Ms. Rita Kopala, Lakeville, Indiana
Mr. Donald Lesch, Porter County, Indiana

Mr. Larry Lough, Editor of the Muncie Star Press
Mr. Michael Lynn, Trials of Life
Mr. Dennis Malloy, Indiana Association of Cities and Towns
Mr. James Rodney Martin
Ms. Helen S. McGaughey, President of the Montgomery County Council and Vice President of Security Abstract & Title Co., Inc.
Mr. Jay McQueen, Department of Administration
Mr. Jeff Modisett, Indiana Attorney General
Ms. Cheryl Ann Munson
Ms. Cheryl Musgrave, Vanderburgh County Assessor
Mr. Bill Nangle, The Times of Northwest Indiana
Ms. Beth O'Laughlin, Association of Indiana Counties
Ms. Anne Mullin O'Connor, Public Access Counselor
Former Governor Robert Orr
Mr. Dan A. Patterson, Attorney for the town of Edinburgh
Ms. Marian M. Percy, Harrison County, Indiana
Mr. Mitchell W. Pearlman, Executive Director, Connecticut Freedom of Information Commission
Ms. Robin Plank
Ms. Charlotte Robertson
Mr. Scott A. Robinett, Indiana Association of Professional Investigators
Mr. Mike Roeder, Indiana Association of Cities and Towns
Dr. Helen Scheibner, Indiana Association of Public Health Physicians
Ms. Lorraine Stasek, Citizens in Action
Ms. Lisa Tanselle, Indiana School Boards Association
Ms. Michelle Terrell
Ms. Julia Vaughn, Common Cause/Indiana
Mr. Phillip B. Wert

Written comments and testimony:

Ms. Dorothy Alabach
Mr. Donald Asher, Porter County Editor, The Times of Northwest Indiana
Mr. Dave Bane, Stallard & Schuh
Mr. John D. Berntson
Ms. Charlene Bredemeier
Mr. Robert D. Brown
Mr. Frank Bush, Executive Director, Indiana School Boards Association
Mr. James F. Crosbie
Mr. Philip W. Dils
Mr. William Dunham
Mr. Jack L. Edwards
Ms. Susan Engelbrecht
Mr. David Fogle
Mr. Steve Freeman
Mr. Dan M. Griffith
Mr. Peter T. Harstad, Executive Director, Indiana Historical Society
Ms. Carole "Kelly" Havens

Mr. John J. Jaros Junior
Mr. Richard and Marguerite Kadlec
Mr. Clarke Kahlo, Protect Our Rivers Now!
Ms. Linda Lockhart
Mr. Michael Marturello
Mr. Michael B. Mountain
Mr. Donald R. Need
Ms. Jean Osborn
Mr. Paul B. Robertson
Mr. John Rosza
Mr. John Seely
Mr. Michael Sutherlin
Ms. Lisa Tanselle, Indiana School Boards Association
Mr. Roger W. Thornton, Executive Director, Indiana Association of Public School
Superintendents
Mr. Rick Volbrecht
Ms. Edith Vores
Mr. Bob Zimmerman